IN THE

Supreme Court of the United States

No. 593

October Term, 1946.

FRANCIS R. COPE, JR.,

Petitioner,

v.

A. M. ANDERSON, Receiver of the National Bank of Kentucky,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

DAVID A. HERR,
JOHN WINTERSTEEN,
HAROLD EVANS,
Philadelphia, Pa.,
Counsel for Petitioner.

Martin & Lyle, 404 Penfield Bldg., Phila., Pa.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Francis R. Cope, Jr., respectfully prays that a writ of certiorari be granted to remove into your Honorable Court for review a judgment of the Circuit Court of Appeals for the Third Circuit entered August 13, 1946, reversing a judgment of the United States District Court for the Eastern District of Pennsylvania in favor of the petitioner above named.

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

(a) The Judgments Below.

The United States District Court for the Eastern District of Pennsylvania on August 3, 1945 entered judgment (R. 49a) granting petitioner's motion to dismiss in accordance with the opinion of the court (R. 43a) filed the same day. The opinion of the District Court is reported in 62 F. Supp. 705 (D. C. Pa., 1945). The opinion of the Circuit Court of Appeals (R. 58a-64a) reversing the judgment of the District Court has not been reported.

(b) Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 13, 1946 (R. 65a). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

(c) The Questions Presented.

(1) Is the suit barred by the Pennsylvania Act of June 26, 1895, a part of the general limitation law of the forum, which "borrows" the limitation period of the State where the cause of action arose?

(2) Does the limitation law of the forum apply in an action by a receiver of a national bank to enforce the double liability of its shareholders, which liability has its origin in a federal statute?

(3) When the receiver of a national bank, in accordance with an assessment made by the Comptroller of the Currency, directs the shareholders of that bank to pay the assessment to him at his office on or before a specified date, does the cause of action arise and accrue *when* payment is not so made and *where* the shareholder was directed and had the duty to make the payment?

(d) The Statutes Involved.

Section 12 of the National Bank Act:

> "The shareholders of every national banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares * * *" (Rev. Stat. §5151, 12 U. S. C. §63; derived from Act of June 3, 1864, c. 106, §12, 13 Stat. 102.)

Section 23 of the Federal Reserve Act:

> "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. * * *" (38 Stat. 273, 12 U. S. C. §64.)

The Pennsylvania Act of June 26, 1895:

> "When a cause of action has been fully barred by the laws of the state or country in which it arose, such bar shall be a complete defense to an action thereon brought in any of the courts of this commonwealth."

(Act of June 26, 1895, P. L. 375, §1, 12 Purd. Stat. §39.)

The Kentucky Statute of Limitations:

"An action upon a contract not in writing, signed by the party, express or implied; an action upon a liability created by statute, when no other time is fixed by the statute creating the liability * * * shall be commenced within five years next after the cause of action accrued." (General Statutes, Chap. 71, Art. III, Sec. 2; Kent. Rev. Stat., Baldwins 1930 Rev., Chap. 80, Sec. 2515.)

The District of Columbia Code (1940 ed.), Section 12-201:

"No action shall be brought * * * upon any simple contract, express or implied * * * after three years from the time when the right to maintain any such action shall have accrued; nor for any statutory penalty or forfeiture * * * after one year from the time when the right to maintain any such action shall have accrued; and no action the limitation of which is not otherwise specially prescribed in this section shall be brought after three years from the time when the right to maintain such action shall have accrued.* * *" (Act of March 3, 1901, 31 Stat. 1389, Chap. 854, §1265; Act of June 30, 1902, 32 Stat. 542, Chap. 1329.)

(c) Statement of Facts.

Respondent is Receiver of the National Bank of Kentucky ("The Bank") (R. 5a), a national banking association domiciled at Louisville, Jefferson County, in the Western District of Kentucky (R. 4a).

Petitioner is a shareholder of The BancoKentucky Com-

pany ("Banco") (R. 21a), a financial corporation organized under the laws of the State of Delaware (R. 12a).

On April 22, 1927, the shareholders of The Bank, together with the shareholders of Louisville Trust Company, transferred their shares of both institutions to six trustees and received for them participation certificates. The trustees were the record owners of all shares of both banks and the participation certificate holders were the real and beneficial owners (R. 8a-9a). In 1929 the holders of participation certificates transferred their certificates to Banco in exchange for Banco shares.

On November 17, 1930 the Comptroller of the Currency appointed a receiver of The Bank and on February 20, 1931, levied 100% assessment against its shareholders (R. 4a, 17a). In March, 1931, the Receiver, "acting pursuant to the authority and direction of the Comptroller of the Currency," notified Banco shareholders that demand had been made upon Banco for the payment of the assessment and that if he did not succeed in collecting from Banco he intended to proceed against the said Banco shareholders (R. 17a). The notice stated in part:

> "As a stockholder in the BancoKentucky Company, you will please take notice, that the *Comptroller of the Currency has* on February 20, 1931, *levied an assessment* upon the stockholders of The National Bank of Kentucky, Louisville, Ky., on the par value of each and every share, *payable at the Office of the Receiver* (Louisville, Kentucky) on or before April 1, 1931." (Parenthesis and italics added.)

In October, 1931, the Receiver of The Bank sued Banco for the assessment as the holder of substantially all of The Bank's shares (R. 18a) and obtained a judgment which was affirmed on appeal: *Laurent v. Anderson*, 70 F. (2d) 819 (C. C. A. 6th, 1934). $90,745.17 was paid on that judgment (R. 19a).

On February 17, 1936, A. M. Anderson, substituted re-

ceiver of The Bank, started an action in the United States District Court for the Western District of Kentucky against certain stockholders of Banco: [*Anderson v. Abbott, et al.*, 32 F. Supp. 328 (D. C. Ky., 1940)]. On March 23, 1940, the District Court handed down an opinion dismissing the action. The United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court: [*Anderson v. Abbott, et al.*, 127 F. (2d) 696 (C. C. A. 6th, 1942)].

This Court in a five to four decision on March 6, 1944, reversed the two courts below: [*Anderson v. Abbott, et al.*, 321 U. S. 349 (1944)].

A. M. Anderson, Receiver of The Bank, began the Pennsylvania phase of this litigation by filing suit against petitioner and other stockholders of Banco in the District Court of the United States for the Eastern District of Pennsylvania on February 18, 1937 (R. 1a), five years and 323 days after the cause of action arose. Petitioner filed a motion to dismiss on the ground, inter alia, that the action was barred under the Pennsylvania "borrowing" statute of limitations (Act of June 26, 1895) (R. 42a). Further proceedings were postponed pending the outcome of the proceedings instituted in the District Court of the United States for the Western District of Kentucky in the case of *Anderson v. Abbott, et al.* (outlined *supra*). The District Court for the Eastern District of Pennsylvania in an opinion by District Judge Bard, filed August 3, 1945, held that the action was barred and dismissed the complaint (R. 43a-49a). On October 3, 1945, the receiver filed his appeal in the Circuit Court of Appeals for the Third Circuit. On August 13, 1946, the said Circuit Court of Appeals reversed the judgment of the District Court. On August 27, 1946, petitioner filed a petition for rehearing which was denied by the Circuit Court of Appeals for the Third Circuit on September 10, 1946.

II. REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) The decision of the Circuit Court of Appeals for the Third Circuit, a review of which is sought, is in direct conflict with the decision rendered by the Circuit Court of Appeals for the Sixth Circuit in the case of *Lawrence S. Helmers, et al. v. A. M. Anderson, Receiver of the National Bank of Kentucky*, 156 F. (2d) 47 (C. C. A. 6th, 1946) (decided June 24, 1946; rehearing denied August 19, 1946). The *Helmers* case was an action by the same Receiver against certain shareholders of Banco who are residents of Ohio. In that case a motion to dismiss based on an Ohio "borrowing" statute very similar to the Pennsylvania "borrowing" statute was granted. Counsel for the Receiver has indicated that the Receiver will petition this Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit.

(2). The decision of the Circuit Court of Appeals for the Third Circuit, a review of which is sought, is in conflict with applicable decisions of this Court in that: (a) it refuses to apply the limitation law of the forum in accordance with the decisions in *Fisher v. Whiton*, 317 U. S. 217 (1942) and *Rawlings v. Ray*, 312 U. S. 96 (1941); (b) it applies to this case, where there is concurrent jurisdiction in law and equity, decisions applicable only where the sole remedy is in equity and is inconsistent with the decision in *Russell v. Todd*, 309 U. S. 280 (1940). The judgment of the court below is also inconsistent in principle with the decisions in *Brown v. O'Keefe*, 300 U. S. 598 (1937); *Chisholm v. Gilmer*, 299 U. S. 99 (1936); *Bernheimer v. Converse*, 206 U. S. 516 (1907); and *Platt v. Wilmot*, 193 U. S. 602 (1904).

WHEREFORE your petitioner prays that this petition be granted and that a writ of certiorari issue to review the

judgment of the Circuit Court of Appeals for the Third Circuit entered August 13, 1946.

DAVID A. KERR,

JOHN WINTERSTEEN,

Harold Evans

HAROLD EVANS,

Philadelphia, Pa.,
Counsel for Petitioner.